Supreme Court, U.S.
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No. 95-1473

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PRAXAIR, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY AND
FLORIDA POWER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

NATHAN P. EIMER
CONSTANTINE L. TRELA, JR.*
DAVID D. MEYER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

* Counsel of Record

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PETITIONER'S REPLY BRIEF

In their briefs in opposition, respondents do not attempt to argue that a state agency may retroactively confer antitrust immunity upon past anticompetitive conduct. Nor do they directly take issue with petitioner's contention that such a proposition would conflict with the Ninth Circuit's decision in *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995), and with the rationale for the state-action immunity doctrine articulated by this Court. Instead, respondents contend, somewhat surprisingly, that the Eleventh Circuit's decision in this case did not embrace such a proposition. Respondents' attempt to explain away the conflict by recasting the Eleventh Circuit's decision is, however, refuted by the opinion below.

1. Respondents' principal contention is that the Eleventh Circuit's opinion rests on a factbound determination that the Florida Public Service Commission ("the Commission") approved respondents' territorial allocation of Brevard County in 1965. Respondents contend that the Eleventh Circuit's reference to the Commission's post-1965 statements and actions was intended merely as "an aid to interpretation" of the 1965 Order, *see* FPL Opp. at 8, or as an "alternative holding" in support of summary judgment, *see* FPC Opp. at 4. Respondents' characterizations of the decision below, however, cannot be squared with the Eleventh Circuit's own explanation of its holding.

The Eleventh Circuit began its analysis by stating that "[t]he question presented is whether, in the [Commission's 1965] order approving the territorial agreement *or in events since that time*, there has been sufficient 'state action' by the Florida Public Service Commission which would allow FPC and FPL to divide service territories in Brevard County . . . ." 64 F.3d at 611, App. 3a (emphasis in original). The court of appeals noted that the district court had denied the parties' cross-motions for summary judgment "on the ground that there was a disputed issue of material fact concerning whether Mims [the site of petitioner's plant] is located in the area covered by the approved [1965] agreement." 64 F.3d at 612, App. 4a-5a. The Commission's 1965 Order, after all, purportedly concerned utility service only in four named Florida counties *other than* Mims' Brevard County, and had been issued upon notice only to officials in the four named counties and only following assurances by the utilities that the proposed territorial agreement was "not comprehensive" and left "unresolved" the question of how to allocate territories elsewhere. *See* Pet. 3-5 & n.1.

The court of appeals did not purport to resolve this "disputed issue of material fact" on appeal. Nor, given the state of the record, could it have done so against

petitioner. To be sure, the court stated its belief that it was "entirely plausible" and "[a] logical interpretation" of the 1965 Order to infer that Brevard County was impliedly allocated to FPL by the Commission in 1965. 64 F.3d at 613, App. 7a. The court also opined that its review of testimony offered during the public hearing that preceded the 1965 Order "confirm[ed]" the reasonableness of this inference. *Id.* But the court of appeals pointedly did not hold that its reading of the record was the *only* reasonable or plausible one and, as the Eleventh Circuit elsewhere has noted, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Warrior Tombigbee Transp. Co.* v. *M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983).

Thus, the court of appeals did not reverse the district court's denial of summary judgment based upon an appellate resolution of the "disputed issue of material fact" concerning the intended scope of the 1965 Order. Rather, the court reversed the district court based upon its determination that that factual issue was ultimately immaterial. "In our judgment," the court of appeals explained, "the district court erroneously focused primarily on the utilities' and Commission's intent in the original proceedings which culminated in the 1965 approval order, and did not give proper consideration to the parties' conduct and the Commission activity since that time." 64 F.3d at 612, App. 5a. The Eleventh Circuit thus expressly held that whether the State approved the private allocation of Brevard County to FPL in 1965 was *not dispositive*, and that the Commission's subsequent approval could suffice to confer immunity. On the basis of the court's assessment of the evidence concerning the subsequent approval —in particular, the Commission's 1989 declaratory order —the court of appeals held that summary judgment should be entered for respondents.

FPL argues that "[t]he court of appeals relied on the Commission's post-1965 actions [only] as aids to *inter-*

pretation of [the 1965 Order], not as freestanding grants of retroactive antitrust immunity." FPL Opp. at 8 (emphasis in original). But that view cannot be reconciled with the court of appeals' holding that "[e]ven if it was not clearly intended in the original agreements to include Brevard County [in the 1965 allocation], . . . the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area." 64 F.3d at 613, App. 8a. Although the Eleventh Circuit clearly deferred to the Commission's post-litigation "interpretation" of its 1965 Order, it is equally clear that the court considered it immaterial whether the Commission had in fact approved the anticompetitive conduct *in 1965*.[1] For the Eleventh Circuit, it was sufficient that the Commission somewhere down the road—even after this litigation had commenced—expressed approval of re-

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[1] Respondents' (and the court of appeals') reliance upon the rule requiring deference to an agency's interpretation of its own regulations, *see* FPC Opp. at 5, is misplaced. Courts defer to agency interpretations of their own rules on one of two grounds. Where the interpretation is contemporaneous with the rule it interprets, it can be presumed reliably to reflect the drafters' intent. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 4, 16-17 (1965). Where the interpretation post-dates the rule, it may still be considered authoritative on the rationale that the agency is entitled to exercise its delegated policymaking authority by way of interpretive amendments. *See, e.g., Stinson* v. *United States*, 113 S. Ct. 1913, 1918-20 (1993). In the context of this case, neither rationale applies. The Commission's 1989 "interpretation" of its 1965 Order is obviously not contemporaneous and so is not a reliable indication of the 1965 Commission's intent. And, although the Commission indisputably has the policymaking authority to confer immunity prospectively through "interpretive" amendments or otherwise, it is petitioner's contention that the Sherman Act does not permit States to make such policy retroactively. *Accord Columbia Steel Casting*, 60 F.3d at 1398 n.7 (utility commission's 1992 declaratory statement "clarifying" the commission's intent in a 1972 order was irrelevant to the question whether the 1972 order conferred state-action immunity on private parties). Accordingly, *Udall* and *Stinson* have no bearing on this case.

spondents' decades-old and anticompetitive territorial pact. Accordingly, the decision below squarely rests upon a retroactive conferral of state-action immunity and cleanly presents the legal question framed by the petition.

2. Respondents' effort to harmonize the Eleventh Circuit's ruling with the Ninth Circuit's decision in *Columbia Steel Casting* fails for the same reason as their attempt to recast the opinion below. FPL suggests that the two cases are not in conflict because *Columbia Steel Casting* involved a retroactive "amendment" of an earlier state order (which the Ninth Circuit held was ineffective to confer state-action immunity), whereas this case involves only a subsequent agency "interpretation" of its earlier order. *See* FPL Opp. at 10. But there is clearly no substance to that distinction.

In *Columbia Steel Casting*, as in this case, the state utilities commission issued a declaratory statement after the commencement of antitrust litigation that purported merely to "clarify"—*not* to alter—its original order approving service territories.[2] The Ninth Circuit, however, squarely held that "the clarifications made by the PUC *after* the anticompetitive conduct at issue in this case" were irrelevant to the controlling legal question—namely, "whether the anticompetitive actions were authorized when undertaken." *Columbia Steel Casting*, 60 F.3d at 1398 n.7 (emphasis in original). Thus, the Ninth Circuit characterized the agency's post-litigation declaratory statement as a "retroactive amendment" of its original order, whereas the Eleventh Circuit in this case styled the Florida Commission's post-litigation declaratory statement as an

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[2] As the Ninth Circuit recounted the agency's action:

> "[I]n April, 1992, the [Oregon Public Utilities Commission] issued its ruling on PGE's application for a declaratory order, stating that while 'perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP & L,' it was PUC's intent to approve such an allocation."

Columbia Steel Casting, 60 F.3d at 1394.

"interpretation" of its 1965 Order. But that different phraseology cannot obscure that both state agencies were attempting to accomplish precisely the same result through their post-litigation declaratory statements and that the Ninth Circuit held one to be legally ineffective while the Eleventh Circuit found the other to be legally controlling.

FPC takes a somewhat different tack. It frankly acknowledges that the Eleventh Circuit (in what FPC mischaracterizes as an "alternative holding") found immunity based on the Commission's "subsequent interpretation *and implementation* of its 1965 order." FPC Opp. at 4 (emphasis added). FPC, however, attempts to harmonize that holding with *Columbia Steel Casting* by arguing that the Ninth Circuit similarly upheld state-action immunity based upon subsequent agency action providing an " 'authoritative clarification' " of an earlier state order approving a private territorial pact. *Id.* (quoting *Columbia Steel Casting*, 60 F.3d at 1398). But FPC omits from its discussion the Ninth Circuit's crucial qualification that distinguishes the two cases and that places the two circuits squarely in conflict. In finding that a 1974 agency order provided an "authoritative clarification" of the agency's intention to approve exclusive service territories in 1972, the Ninth Circuit made expressly clear that the subsequent agency action was relevant only because it was *"issued before the acts that gave rise to this lawsuit."* 60 F.3d at 1398 (emphasis added).[3] To avoid any ambiguity, the Ninth Circuit added a footnote at the end of that qualifying clause in which it emphasized that state-action immunity could not be based

> "on the clarification made by the [state agency] *after* the anticompetitive conduct at issue in this case . . . .

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[2] Thus, the full sentence from which FPC extracts its fragmentary quotation reads: "This official statement [the 1974 agency order], issued before the acts that gave rise to this lawsuit, is an authoritative clarification of [agency] intention." 60 F.3d at 1398 (footnotes omitted).

> The question is whether the anticompetitive actions were authorized when undertaken . . . ."

60 F.3d at 1398 n.7 (emphasis in original).

In this case, petitioner received its first electric bill reflecting noncompetitive rates in 1965, but the Eleventh Circuit found state-action immunity based on post-1965 expressions of state approval, particularly the Commission's 1989 declaratory statement issued after this lawsuit had been filed. The conflict between the circuits thus could not be clearer: the Ninth Circuit expressly held that agency approval that post-dates private anticompetitive conduct is ineffective to confer immunity, while the Eleventh Circuit held that such *post-hoc* expressions of approval compelled a finding of immunity.[4]

3. Finally, FPL suggests that certiorari should be denied because there exists an alternative ground for affirming the judgment below. Specifically, FPL argues that petitioner cannot show "antitrust injury" because Florida law assertedly would not permit FPC to sell electric power to petitioner even if respondents' private territorial agreement were illegal under the Sherman Act. *See* FPL Opp. at 12-13. FPL's characterization of state law, however, is untenable.

First, FPL's contention that "Florida's regulatory policy prohibits retail competition between utilities irrespective of any territorial agreement," FPL Opp at 12, is refuted by the district court's finding, affirmed by the court of appeals, that "Florida's policy of non-competition" among utilities applies only where the Commission has approved a valid division of territories:

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[4] The existence of "intra-circuit tension" on this question within the Ninth Circuit, *see* FPL Opp. at 12 n.5, underscores petitioner's contention that the persistence of two competing models of the state action doctrine has resulted in confusion and muddled decisionmaking in the courts of appeals. *See* Pet. 11-19. The conflict which petitioner asks this Court to resolve, however, is *inter*-circuit.

> "Florida, through its legislation, regulation, and judicial holdings and pronouncements, has demonstrated its intent to displace competition in the field of retail electric service *with a regulatory mechanism to designate territorial boundaries.*"

App. 20a (emphasis added). "Under Florida's policy of non-competition, the validity of a territorial agreement is premised upon Commission approval." *Id.; see also* 64 F.3d at 612, App. 5a. Thus, as both the district court and court of appeals found, if an electric utility denies service in the absence of an approved territorial agreement, that anticompetitive act is *contrary* to Florida's regulatory policy and not entitled to state-action immunity. *See* App. 20a-21a; 64 F.3d at 612, App. 5a.

Second, the lower courts' understanding of Florida's regulatory policy is confirmed by the Florida Public Service Commission's 1989 declaratory order. There, the Commission declared that FPL was justified in refusing to "wheel" FPC-generated power to petitioner solely because the Commission approved of the utilities' territorial allocation of Brevard County to FPL. *See* App. 46a, 53a.[5] The Commission nowhere suggested, as FPL now claims, that FPC would be required to deny service to petitioner "irrespective of any territorial agreement."

Finally, because neither the district court nor the court of appeals addressed respondents' "injury" argument, this Court properly may leave that question to the lower courts in the event that it finds the Eleventh Circuit's analysis to be in error. *See Wilson* v. *Arkansas*, 115 S. Ct. 1914,

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[5] The Commission thus explained that its holding turned on the existence of a valid territorial agreement:

> "We determine that pursuant to the applicable Florida statutes and case law, FPL is not required to wheel the power as requested by Union Carbide *when such wheeling contravenes the territorial agreement in effect between FPL and FPC, which has been approved by this Commission.*"

App. 46a (emphasis added).

1919 n.4 (1995); *Stinson* v. *United States*, 113 S. Ct. 1913, 1920 (1993). Accordingly, FPL's meritless contentions concerning Florida's regulatory policy provide no reason to deny review of the important federal question presented by the clear holding of the court of appeals in this case.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

NATHAN P. EIMER
CONSTANTINE L. TRELA, JR.*
DAVID D. MEYER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

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* Counsel of Record